FILE COPY

OCT 14 1930
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930

No. 96

DISTRICT OF COLUMBIA, PETITIONER,

v.

WILLIAM H. COLTS

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT

WILLIAM B. O'CONNELL,
HARRY T. WHELAN,
LOUIS L. WHITESTONE,
Attorneys for Respondent.

INDEX

	Page
Question to be decided.	1
Constitutional requirements for trial by jury.	3
Origin and value of trial by jury.	5
What determines when the Constitutional Guarantee attaches.	9
Has Congress the power to fix arbitrary limits of punishment as the test for determining the right of a defendant to a trial by jury in a criminal case?	12
The offense with which the defendant was charged is a crime.	18

CITATIONS

	Page
American Publishing Co. v. Fisher, 166 U. S. 466	14
Barron v. Mayor and City Council of Baltimore, 7 Peters 243	18
Blackstone's Commentaries, Book III, page 379	6
Blackstone's Commentaries, Book IV, pages 280, 281, 282	9
Blackstone's Commentaries, Book IV, page 166	11
Blackstone's Commentaries, Book IV, pages 217, 283	12
Blackstone's Commentaries, Book IV, page 5	19
Byars v. United States, 273 U. S. 28	19
Callan v. Wilson, 127 U. S. 540	5
Patton v. United States, 74 U. S. 405, L. ed	5
Schick v. U. S., 195 U. S. 65	4

UNITED STATES CONSTITUTION

Article III, Section 2, Clause 3	3
Sixth Amendment to the Constitution	3

UNITED STATES STATUTES

Act of March 3, 1925, C. 443, 43 Stat. 1119	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930

No. 96

DISTRICT OF COLUMBIA, PETITIONER,

v.

WILLIAM H. COLTS

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT

I.

Question to be Decided.

At the outset of the brief filed herein on behalf of the District of Columbia (p. 2), there is the following statement:

> "The question at issue is whether in the District of Columbia a defendant who is accused of reckless driv-

ing, which may be punished by imprisonment for thirty days, may be tried by the police judge without a jury in spite of the defendant's demand for a jury trial."

While it true that the defendant in this case was charged with the offense of reckless driving; was convicted and sentenced to thirty days in jail in spite of his demand for a jury trial, a careful analysis of the entire case discloses there is more involved here than the question as set forth by the District of Columbia in its brief. Under the provisions of the Statute, the maximum punishment for the offense of reckless driving in the District of Columbia is a fine of $100.00, or imprisonment not to exceed thirty days. There is nothing, however, in that particular Act that says the defendant is not entitled to a jury trial. The authority on which the District of Columbia relies for denying the defendant a trial by jury is the Act of Congress, known as the District of Columbia Traffic Act (Act of March 3, 1925, c. 443, 43 Stat. 1119), which provides:

"Sec. 4. The second paragraph of Section 44 of the District of Columbia Code hereby is amended to read as follows: 'In all cases where the accused *would not by force of the Constitution of the United States* be entitled to a trial by jury, the trial shall be by the court without a jury, unless in such of said last-named cases wherein the fine or penalty may be more than $300, or imprisonment as punishment for the offense may be more than ninety days, the accused shall demand a trial by jury, in which case the trial shall be by jury. In all cases where the said court shall impose a fine it may, in default of the payment of the fine imposed, commit the defendant for such a term as the court thinks right and proper, not to exceed one year.' "

It will be seen, therefore, that the test as to whether or not a defendant is to be entitled to a trial by jury is whether or not the particular offense, with which he might be charged, is punishable by a sentence, which may exceed a fine of $300, or imprisonment in excess of ninety days, unless he is entitled to a jury trial by force of the Constitution of the United States. Under this Act of Congress, if the punishment is below these limits, a defendant is not entitled to a jury trial, unless guaranteed by the Constitution. If the punishment is beyond these limits, a defendant is entitled to a trial by jury, if he so requests. Congress, in passing this statute, seems to take it for granted that there are some offenses for which the Constitution requires a jury trial regardless of the punishment which may be imposed, but gives no indication of what these offenses are. The ultimate question therefore to be decided is when is a defendant entitled to a jury trial by force of the Constitution?

II.

Constitutional requirements for Trial by Jury.

There are two provisions in the Constitution of the United States regarding the right to trial by jury in criminal cases. The first is contained in Article III, Section 2, Clause 3, wherein it is stated that "the trial of all crimes, except in cases of impeachment, shall be by jury"; and the other is found in the Sixth Amendment, which provides "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed."

There is no question raised whatever regarding the facts in this case. Whether the evidence against the defendant Colts was or was not sufficient to justify his conviction, is beside the question. If he was, by force of the Constitution, entitled to a trial by jury, the verdict cannot stand; if he was not entitled to a jury trial, the conviction is valid.

A careful review of all the Federal authorities does not reveal a single federal case in a federal court wherein a defendant was denied, over his demand for such a trial, a trial by jury when charged with a criminal offense. If the offense is a criminal offense, there can be no question but what the defendant is entitled to a trial by jury. The language of the Constitution and of the Sixth Amendment says so in language that is so clear and unequivocal that it is not susceptible of any other interpretation. No case has been found which indicates *when* the Constitution guarantees a trial by jury. In the case of Schick v. United States, 195 U. S. 65, this Court, speaking through Mr. Justice Brewer, said:

> "The truth is, the nature of the offense and the amount of punishment prescribed, rather than its place in the statutes, determine whether it is to be classed among serious or petty offenses, whether among crimes or misdemeanors."

With this as a guide, the matter to be determined is, not only could the defendant Colts be deprived of his liberty for a period of thirty days in spite of his demand for a jury trial, but are there any offenses which may be punished by a sentence up to ninety days in jail without a jury trial?

Counsel for the District of Columbia rely in a great measure on the authority of Schick v. United States, (supra),

wherein the defendant, who was charged with a violation of the Pure Food Laws, having waived a trial by jury, was fined $50.00, the maximum penalty under the Statute for the offense with which he was charged. When an attempt was made to collect the penalty, Schick sought to have his conviction reversed because he did not have a jury trial. Relying on the Schnick case, petitioner, in its brief, says that this Court has declared that Congress may require the trial of petty offenses without a jury. It is urged that this Court has not committed itself to any such ruling. In the Schick case, this court held that the defendant, having waived his trial by jury, the offense being of a petty nature, his waiver would stand. In view of the recent decision by this court in the case of Patton v. United States, decided April 4th, 1930, the waiver would have been binding on the defendant, regardless of whether it was a petty offense or a serious criminal offense of which he had been convicted.

In the case at bar, there is no question of a waiver of a jury trial. The defendant here specifically and emphatically made his demand for a trial by jury.

III

Origin and Value of Trial by Jury.

In the case of Callan vs. Wilson, 127 U. S. 540, is found the following language regarding the meaning of the Third Article of the Constitution, providing for the trial of crimes by jury:

"It is not to be construed as relating only to felonies, or offenses punishable by confinement in the penitentiary. It embraces as well some class of misdemeanors, the punishment of which involves or *may involve the deprivation of the liberty of the citizen.*"

The English-speaking people generally regard their right to a trial by jury as originating by the provisions of Magna Carta, wherein it is said:

"No free man shall be taken or imprisoned, or disseised or outlawed, or will we send upon him, except by the legal judgment of his peers or by the law of the land."

Whether our right to a trial by jury in a criminal case originated here or not, makes no difference. A careful study of the history of Criminal Jurisprudence will disclose the fact that a trial by jury, in one form or another, was known many hundreds of years before Magna Carta.

It is well to refer to the observations of Blackstone in Book III, of his Commentaries, at page 379, regarding the value of trial by jury:

"Upon these accounts the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law. And if it has so great an advantage over others in regulating civil property, how much must that advantage be heightened when it is applied to criminal cases! But this we must refer to the ensuing book of these commentaries: only observing for the present, that it is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his

property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals. A constitution that I may venture to affirm has, under Providence, secured the just liberties of this nation for a long succession of ages. And therefore a celebrated French Writer, who concludes that because Rome, Sparta, and Carthage have lost their liberties, therefore those of England in time must perish, should have recollected that Rome, Sparta, and Carthage, at the time when their liberties were lost, were strangers to the trial by jury.

"Great as this eulogium may seem, it is no more than this admirable constitution, when traced to its principles, will be found in sober reason to deserve. The impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely intrusted to the magistracy, a select body of men, and those generally selected by the prince, or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity; it is not to be expected from human nature, that the few should be always attentive to the interests and good of the many. * * *

"But in settling and adjusting a question of fact, when intrusted to any single magistrate, partiality and injustice have an ample field or range in; either by boldly asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder. Here therefore a competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth and the surest guardians of public justice. For the most powerful individual in the

state will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men, not appointed till the hour of trial; and that, when once the fact is ascertained, the law must of course redress it. This therefore preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens. Every new tribunal, erected for the decision of facts, without the intervention of a jury, (whether composed of justices of the peace, commissioners of the revenue, judges of a court of conscience, or any other standing magistrates), is a step towards establishing aristocracy, the most oppressive of absolute governments. The feodal system, which, for the sake of military subordination, pursued an aristocratical plan in all its arrangements of property, had been intolerable in times of peace, had it not been wisely counterpoised by that privilege, so universally diffused through every part of it, the trial by the feodal peers. And in every country on the continent, as the trial by the peers has been gradually disused, so the nobles have increased in power, till the state has been torn to pieces by rival factions, and oligarchy in effect has been established, though under the shadow of regal government; unless where the miserable commons have taken shelter under absolute monarchy, as the lighter evil of the two. And, particularly, it is a circumstance well worthy an Englishman's observation, that in Sweden the trial by jury, that bulwark of northern liberty, which continued in its full vigour so lately as the middle of the last century, is now fallen into disuse: and that there, though the regal power is in no country so closely limited, yet the liberties of the commons are extinguished, and the government is degenerated into a mere aristocracy. It is therefore, upon the whole, a duty which every man

owes to his country, his friends, his posterity, and himself, to maintain to the utmost of his power this valuable constitution in all its rights; to restore it to its antient dignity, if at all impaired by the different value of property, or otherwise deviated from its first institution; to amend it, wherever it is defective; and above all, to guard with the most jealous circumspection against the introduction of new and arbitrary methods of trial, which, under a variety of plausible pretences, may in time imperceptibly undermine this best preservative of English liberty."

IV

What determines when the Constitutional Guarantee attaches.

It has never before been claimed that a defendant charged with a criminal offense in a court under the jurisdiction of our Federal Government, was not entitled to a trial by jury. It cannot be denied by the District of Columbia that the offense with which the defendant was charged was a criminal offense. It is urged however that the offense was of such a petty nature that it should be tried by a summary proceeding, without a jury.

Blackstone's Commentaries, in Book IV, at pages 280, 281 and 282, has this to say regarding summary proceedings:

> "We are next, according to the plan I have laid down, to take into consideration the proceedings in the courts of criminal jurisdiction in order to the punishment of offences. These are plain, easy, and regular; the law not admitting any fictions, as in civil causes, to take place where the life, the liberty, and

the safety of the subject are more immediately brought into jeopardy. * * *

"Another branch of summary proceedings is that before justices of the peace, in order to inflict divers petty pecuniary mulcts and corporal penalties denounced by act of parliament for many disorderly offences, such as common swearing, drunkenness, vagrancy, idleness, and a vast variety of others, for which I must refer the student to the justice-books formerly cited, and which used to be formerly punished by the verdict of a jury in the court-leet. This change in the administration of justice hath, however, had some mischievous effects; as, * * *

"3. A third mischief, which is, that this trust, when slighted by gentlemen, falls of course into the hands of those who are not so, but the mere tools of office. And then the extensive power of a justice of the peace, which even in the hands of men of honour is highly formidable, will be prostituted to mean and scandalous purposes, to the low ends of selfish ambition, avarice, or personal resentment. And from these ill consequences we may collect the prudent foresight of our antient lawgivers, who suffered neither the property nor the punishment of the subject to be determined by the opinion of any one of two men; and we may also observe the necessity of not deviating any further from our antient constitution by ordaining new penalties to be inflicted upon summary convictions."

If the offense is not to be deemed so petty as to justify the trial of the defendant without a jury, the District of Columbia urges that the offense, with which the defendant was charged, was not an indictable offense known to the common law. It is claimed that the offense with which the de-

fendant, Colts, was charged, at most, was no more than a breach of the peace consisting of fast driving so as to endanger the lives and safety of citizens, which was not an indictable offense at common law, and, this not being an indictable offense at common law, the defendant would not have been entitled to a trial by jury at common law, and therefore is not now entitled to a trial by jury. As is said in Blackstone's Commentaries, in Book IV, on page 166:

> "5. To descend next to offenses whose punishment is short of death. Common nuisances are a species of offence against the public order and economical regimen of the state, being either the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires. * * * Of this nature are, 1. Annoyances in highways, bridges, and public rivers, by rendering the same inconvenient or dangerous to pass, either positively, by actual obstructions, or negatively, by want of reparations. For both of these, the person so obstructing, or such individuals as are bound to repair and cleanse them, or (in default of these last) the parish at large, *may be indicted,* distrained to repair and mend them, and in some cases fined. And a presentment thereof by a judge of assize, etc., or a justice of the peace, shall be in all respects equivalent to an indictment."

If a defendant drove an automobile in the manner set out in the information filed in this case, it would be such an offense as would have amounted to a common nuisance at common law, and would therefore have been an indictable offense, and one entitling a defendant to a trial by jury, even at common law.

Again in Blackstone's Commentaries, Book IV, are to be found the following observations:

Page 218:

> "And, indeed, there can be no doubt but that all kinds of crimes of a public nature, all disturbance of the peace, all oppressions and other misdemeanours whatsoever of a notoriously evil example, may be indicted at the suit of the king. * * *

Page 273:

> "The other general business of the leet and tourn was to present by jury all crimes whatsoever that happened within their jurisdiction; and not only to present, but also to punish, all trivial misdemeanours, * * *. The objects of their jurisdiction are therefore unavoidably very numerous: being such as in some degree, either less or more, affect the public weal or good governance of the district in which they arise; from common nuisances, and other material offenses against the king's peace and public trade, down to eaves-dropping, waifs, and irregularities in public commons."

V

Has Congress the power to fix arbitrary limits of punishment as the test for determining the right of a defendant to a trial by jury in a criminal case?

While it is true that so far as the defendant Colts is concerned, the only question herein is whether or not the conviction for the offense charged shall be sustained, it is very seriously urged that this Court should and ought to pass upon the constitutionality of the Act of Congress, which attempts

to deny jury trials in criminal prosecutions, wherein the punishment does not exceed ninety days imprisonment or a fine of $300. This is a very serious question and one that strikes at the very foundation of our liberty. Is Congress authorized to draw a line and say, "Up to this point you shall have no jury trial"? If the Congress is to be permitted to say that up to ninety days, a defendant, in a criminal case, is not entitled to have a jury trial, there is nothing to prevent that same Congress from saying, up to six months, nine months, or a year, there shall be no trials by jury. For instance, if Congress has the authority to draw a line marking the point at which jury trials begin and end, there are innumerable Federal Statutes punishing a great many misdemeanors, especially the National Prohibition Act, that Congress could very summarily enforce, either by reducing the amount of imprisonment for various violations, which might be imposed upon conviction, or increasing the limit up to which a defendant was entitled to a jury trial. As pointed out by Mr. Justice Robb of the Court of Appeals for the District of Columbia, in the opinion he delivered in this case, in the Court below:

> "It would be an anomalous situation indeed if in a civil suit against Colts in the District of Columbia, involving more than $20.00, he could demand a jury trial as of right (7th Amendment) and yet could be deprived of that privilege in a prosecution for a common law offense involving his reputation and liberty."

It is not to be denied that not only the nature or character of the offense is not alone the criterion as to the right of a defendant to a trial by jury; there is also the further element, the punishment which may be prescribed. If ninety days in jail is to be considered a petty offense, it would ap-

pear that the framers of the Constitution placed a greater value on $20.00 than they did upon ninety days of their personal liberty. It is absurd to suggest that any human being places a higher value on $20.00 than on ninety days of his liberty. The observations of this Court in the case of Patton v. United States, above referred to, throw a great deal of light on this particular case. There is quoted therein the remarks of Mr. Justice Brewer, taken from the American Publishing Company vs. Fisher, 166 U. S. 466, as follows:

> "Whatever may be true as to legislation which changes any mere details of a jury trial, it is clear that a statute which destroys this substantial and essential feature thereof is one abridging the right."

Again, in the same opinion is found the following:

> "The record of English and colonial jurisprudence antedating the Constitution will be searched in vain for evidence that trial by jury in criminal cases was regarded as a part of the structure of government, as distinguished from a right or privilege of the accused. On the contrary, it uniformly was regarded as a valuable privilege bestowed upon the person accused of crime for the purpose of safeguarding him against the oppressive power of the king and the arbitrary or partial judgment of the court. Thus Blackstone, who held trial by jury both in civil and criminal cases in such esteem that he called it "the glory of the English law," nevertheless looked upon it as a "privilege," albeit "the most transcendent privilege which any subject can enjoy." Bk. 3, p. 379. And Story, J., writing at a time when the adoption of the Constitution was still in the memory of men then living, speaking of trial by jury in criminal cases said:

" 'When our more immediate ancestors removed to America, they brought this great privilege with them, as their birthright and inheritance, as a part of that admirable common law which had fenced round and interposed barriers on every side against the approaches of arbitrary power. It is now incorporated into all our state constitutions as a fundamental right, and the Consitution of the United States would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms.' 2 Story, Const. Sec. 1779.

"In the light of the foregoing it is reasonable to conclude that the framers of the Constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused. If not, and their intention went beyond this and included the purpose of establishing the jury for the trial of crimes as an integral and inseparable part of the court, instead of one of its instrumentalities, it is strange that nothing to that effect appears in contemporaneous literature or in any of the debates or innumerable discussions of the time. This is all the more remarkable when we recall the minute scrutiny to which every provision of the proposed Constitution was subjected. The reasonable inference is that the concern of the framers of the Constitution was to make clear that the right of trial by jury should remain inviolable, to which end no language was deemed too imperative. That this was the purpose of the third article is rendered highly probable by a consideration of the form of expression used in the 6th Amendment.

" 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *.'

"This provision, which deals with trial by jury clearly in terms of privilege, although occurring later than that in respect of jury trials contained in the

original Constitution, is not to be regarded as modifying or altering the earlier provision; and there is no reason for thinking such was within its purpose. The first ten amendments and the original Constitution were substantially contemporaneous and should be construed in pari materia. So construed, the latter provision fairly may be regarded as reflecting the meaning of the former. In other words, the two provisions mean substantially the same thing; and this is the effect of the holding of this court in Callan v. Wilson, 127 U. S. 540, 549, 32 L. ed. 223, 226, 8 Sup. Ct. Rep. 1301, where it is said:

" 'And we do not think that the Amendment was intended to supplant that part of the third article which relates to trial by jury. There is no necessary conflict between them.'

"Upon this view of the constitutional provisions we conclude that Article 3, Sec. 2, is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election. To deny his power to do so is to convert a privilege into an imperative requirement. * * *.

"In affirming the power of the defendant in any criminal case to waive a trial by a constitutional jury and submit to trial by a jury of less than twelve persons, or by the court, we do not mean to hold that the waiver must be put into effect at all events. That, perhaps, sufficiently appears already. Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses. In such cases the value and appropriateness of jury trial have been established by long experience and are not now to be denied. Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of

> the jury as a fact-finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from the mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity."

In the brief submitted by the District of Columbia in the Court below, as well also as the brief submitted herein, a great deal of space is devoted to the discussion of the decisions in many State courts, which it is claimed support the position of the petitioner that an offense, such as is here involved, may be tried by a summary proceeding. That this is done in some states is not denied, and that this was true in most of the colonies before the adoption of the Constitution is not denied. However, the unbroken line of decisions in this Court have constantly held that the same limitations do not apply to the various states as are applied to the Federal Government. The Federal Government looks to the Constitution of the United States for its authority to perform its functions. This document contains the powers granted to the Federal Government by the States at the time of its adoption. The very purpose of the Constitution itself was to prevent the Federal Government from taking undue liberties with the citizens of the State. At the time of the adoption of the Constitution, the States were more or less suspicious of a centralized Government and were very care-

ful to protect their citizens against any encroachments on the rights of their citizens. It is therefore suggested that the various decisions cited by petitioner from the State courts have no bearing whatever on this case. That this is so, is well illustrated by the language of Mr. Chief Justice Marshall, in the case of John Barron vs. The Mayor and City Council of Baltimore, reported in 7 Peters, page 243, 32 U. S. 242, wherein he said:

> "The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes."

VI

The offense with which the defendant was charged is a crime.

The remaining contention of the District of Columbia is that the offense of reckless driving in the District of Colum-

bia is a municipal offense, notwithstanding the fact that the law was enacted by the Congress of the United States, and that Congress has properly treated this offense as a petty offense. We have but to look to Blackstone's Commentatries again for the definition of a crime, Book IV, Page 5, which is as follows:

> "A crime or misdemeanor is an act committed or omitted in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors; which, properly speaking, are mere synonymous terms. Though in common usage, the word "crimes" is made to denote such offenses as are of a deeper and more atrocious character, while smaller faults and omissions of less consequence are comprised under the gentler term of misdemeanors only."

If this is the true test as to what is a crime, the offense charged herein is certainly a crime, and being a crime it comes within the scope of offenses referred to in the Constitution. That there are many or few of these offenses, is of no importance. No one would seriously urge that a defendant be denied a jury trial solely for the purpose of making prosecution convenient to the Government.

In the case of Byars v. United States, 273 U. S. page 28, wherein the question involved appeared to be the violation of the constitutional rights of a defendant with reference to the legality of a search and seizure, this Court made this observation:

> "While it is true that the mere participation in a state search of one who is a federal offcer does not ren-

der it a federal undertaking, the courts must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods. Constitutional provisions for the security of person and property are to be liberally construed, and 'it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.' Boyd v. United States, 116 U. S. 616; Gouled v. United States, supra, p. 304 (65 L. Ed. 650, 41 Sup. Ct. Rep. 261)." * * *

"The 4th Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and the colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right."

It is submitted therefore that the decision in the Court of Appeals of the District of Columbia should be sustained.

Respectfully submitted,

WILLIAM B. O'CONNELL,
HARRY T. WHELAN,
LOUIS L. WHITESTONE,
Attorneys for Respondent.

October, 1930.